

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Omnipoint Request for Broadband Declaratory)
Ruling Or Waiver Concerning PCS Emission Limits)
Rule Section 24.238)

ORDER

Adopted: August 3, 2000

Released: August 4, 2000

By the Deputy Chief, Wireless Telecommunications Bureau:

1. This Order addresses a request for declaratory ruling or waiver filed by Omnipoint Communications, Inc. ("Omnipoint") concerning Section 24.238 of the Commission's rules. For the reasons discussed below, we grant broadband PCS licensees a waiver of Section 24.238, insofar as it limits out-of-band emissions on: (1) adjacent contiguous frequency blocks that are separately assigned to the same PCS licensee, and (2) adjacent contiguous frequency blocks that are assigned to different PCS licensees who have entered into an agreement(s) concerning interference protection to the adjacent spectrum. This ruling does not waive the rule insofar as it provides out-of-band emission protections to third party licensees.

BACKGROUND

2. On August 12, 1999, Omnipoint filed a request for a declaratory ruling or waiver concerning Section 24.238 of the Commission's rules, which establishes limits on the power of any radio frequency emissions transmitted by broadband Personal Communications Service ("PCS") equipment outside of the licensee's assigned spectrum block.¹ According to Omnipoint, in complying with Section 24.238, the common industry practice for operating systems employing Global System for Mobile Communications ("GSM") technology is to refrain from using two channel pairs adjacent to each spectrum block edge (hereinafter "band-edge channels"). Omnipoint requests a ruling or waiver of Section 24.238 in instances where a PCS carrier is the licensee of adjacent frequency blocks or where adjacent block licensees have reached an agreement for coordinated operations. Such a ruling or waiver, Omnipoint argues, would enable it to use the band-edge channels where it (or another licensee consenting to such use) holds the PCS license for an adjacent spectrum block in the same geographical area.

3. On November 1, 1999, the Wireless Telecommunications Bureau ("Bureau") released a Public Notice² requesting comment on Omnipoint's request and several related issues. Section 24.238 is

¹ 47 C.F.R. §24.238.

² Wireless Telecommunications Bureau Requests Comment on Omnipoint Communications, Inc. Request for Declaratory Ruling or Waiver Concerning PCS Emission Limits Rule § 24.238, *Public Notice*, DA 99-2398 (rel. Nov. 1, 1999). The Bureau invited comment on the following related issues: (1) Should an alternative out-of-band emission limit (or no out-of-band emission limit) apply where the PCS licenses for adjacent spectrum blocks are held by the same licensee (or consenting licensee)? What protection should be afforded to non-participating PCS systems in adjacent spectrum blocks at the geographical boundaries of the systems?; (2) If PCS systems

designed to protect adjacent block PCS operations from harmful interference that could otherwise be caused by excessive out-of-band emissions from PCS equipment.³ Most commenters support Omnipoint's request, arguing that application of the rule is unnecessary in circumstances where: (1) a licensee holds contiguous frequency blocks, or (2) adjacent frequency block licensees negotiate an interference protection arrangement.⁴ GTE Wireless, however, urges the Commission to maintain the emission limit requirement under all circumstances.⁵

DISCUSSION

4. To obtain a waiver, a party must affirmatively show (1) that the underlying purpose of the rule would not be served, or would be frustrated, by its application in a particular case, and that grant of the waiver would be in the public interest, or (2) that the unique facts and circumstances of a particular case render application of the rule inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.⁶ As detailed further below, we find that Omnipoint has satisfied the showing required for a waiver. We therefore grant broadband PCS licensees a waiver of Section 24.238, insofar as it limits out-of-band emissions on: (1) adjacent contiguous frequency blocks that are separately assigned to the same PCS licensee, and (2) adjacent contiguous frequency blocks that are assigned to different PCS licensees who have entered into an agreement(s) concerning interference protection to the adjacent spectrum.

5. The Commission adopted Section 24.238 to "reduce the potential for harmful interference to other PCS operations as well as other radio services operating on spectrum outside of the PCS bands."⁷ After reviewing the record, the Bureau agrees with Omnipoint and supporting commenters that application of Section 24.238 is unnecessary insofar as it limits out-of-band emissions on adjacent contiguous frequency blocks held by the same licensee in the same geographic area. Indeed, the Commission's policy has been to apply out-of-band emission rules only to the extent necessary to protect operations outside of the licensee's authorized spectrum.⁸ Likewise, we agree that Section 24.238 is not needed to safeguard the operations of PCS licensees that have negotiated alternative interference protection arrangements. In both scenarios, we find that harmful interference -- the keystone for the emission limit requirement -- is not an

employing GSM technology were to use the band edge channels, would this significantly increase potential for interference to broadband PCS systems using other technologies?; (3) Is it possible to devise out-of-band emission limits that would permit broadband PCS systems (including those using GSM technology) to more fully utilize their entire assigned spectrum block, yet still provide adequate interference protection to adjacent spectrum users?; and (4) Should broadband PCS out-of-band emission limits apply to spectrum block edges created by spectrum disaggregation?

³ Section 24.238 also limits out-of-band emissions on spectrum assigned to many other services as well. It is recognized however, that the particular situation at the heart of this request involves only out-of-band emissions that fall on the immediately adjacent spectrum and not on spectrum far removed from the channel in use.

⁴ Omnipoint Comments at 1-2; PrimeCo Comments at 2, 5; and Sprint PCS Comments at 2.

⁵ GTE Wireless Comments at 3.

⁶ 47 C.F.R. § 1.925(b)(3). Omnipoint requested a declaratory ruling as an alternative. The Commission may issue a declaratory ruling terminating a controversy or removing an uncertainty. Because we find that Section 24.238 is not ambiguous, a declaratory ruling is not warranted.

⁷ Amendment of the Commission's Rules to Establish New Personal Communications Services, *Memorandum Opinion and Order*, 9 FCC Rcd 4957, 5032 (1994).

⁸ Implementation of Sections 3(n) and 332 of the Communications Act, Third Report and Order, 9 FCC Rcd 7988, 8067-68 (1994).

issue, so long as third party PCS systems are not affected. We therefore conclude that it is in the public interest to grant a waiver of Section 24.238 under the circumstances enumerated above.⁹

6. We recognize the continued need to provide interference protection to adjacent spectrum users. Thus, except for the circumstances governed by the limited waiver granted herein, we affirm that PCS licensees must continue to use equipment that is certified as fully compliant with Section 24.238 in order to protect the operations of non-consenting PCS or other licensees. We will not require additional or separate equipment authorization for PCS equipment that is operated in accordance with the waiver granted herein.

7. With respect to application of Section 24.238 to spectrum block edges created by spectrum disaggregation, we agree with commenters that the Commission has expressly addressed this issue and determined that disaggregating parties may negotiate interference arrangements, but must provide the necessary out-of-band emission protection to third party licensees.¹⁰ We therefore will not revisit this issue here.

8. For these reasons, we find that Omnipoint has made a sufficient showing that grant of a waiver for PCS licensees is warranted under the circumstances described above. Accordingly, IT IS ORDERED that, pursuant to section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i) and section 1.925(b)(3) of the Commission's rules, 47 C.F.R. § 1.925(b)(3), the request for waiver filed by Omnipoint Communications, Inc. is GRANTED as detailed above.

FEDERAL COMMUNICATIONS COMMISSION

James D. Schlichting
Deputy Chief
Wireless Telecommunications Bureau

⁹ This waiver supercedes any conflicting notes on certifications regarding use of the license.

¹⁰ Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees, *Report and Order*, 11 FCC Rcd 21831, 21860 (1996).